Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

NO. 75 - 491

UNITED STATES OF AMERICA,
Petitioner

vs.

LINDA AGURS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The opinion of the Court of Appeals is reported at 510 F.2nd 1249. Several opinions of judges of the Court of Appeals in connection with its denial of the government's petition for rehearing and suggestion for consideration en banc have been separately reported at 520 F.2nd 82.[1/]

1/ These opinions are attached to the government's petition and will not be reproduced here. We have added, as a short appendix, a portion of the transcript which is relevant to the issues.

QUESTIONS PRESENTED

1. Whether, in a murder case in which the defendant, who stabbed the victim with his own knife, defended on a theory of self-defense, the Government deprived the defendent of liberty without due process of law when, despite agreement that it would turn over all exculpatory evidence, the Government failed to disclose evidence in the possession of the Assistant United States Attorney handling the case that the victim had a record of two convictions for assaultive crimes involving knives.

2. Whether, in the event the Court of Appeals' conclusion that reversal was mandated because of a deprivation of liberty without due process of law is not sustained, the reversal is nevertheless sustainable under the Court of Appeals' supervisory obligation, under 28 U.S.C. §2106, to provide a new trial in the interest of justice.

3. In the event that the Court of Appeals' reversal of Respondent's conviction is not sustained because of the Government's failure to disclose the evidence of the victim's convictions for assaultive crimes involving knives, whether the conviction should, in any event, have been reversed for ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, because defense counsel, without doing any research, dismissed the possibility of admitting evidence of the victim's propensity for using a knive when he found that the defendent was not familiar with the victim's reputation and, as a result, failed to conduct an investigation into the victim's background and character.[2/]

2/ This point was raised by Respondent in the Court of Appeals. Since it decided the case on the issue set forth in the first question presented, that Court did not go on to reach the ineffective assistant claim. Our position is that, if the disclosure issue is not decided

(foot note 2 con't)

for respondent, the ineffective assistance issue must be reached to decide the case.

STATEMENT OF THE FACTS

In general, Respondent is prepared to rely on the facts set out in the Court of Appeals' Opinion.

As that opinion notes, Ms. Agurs was charged with second degree murder for the killing of James Sewell with his own knife. Ms. Agurs was found struggling with Mr. Sewell in a hotel room into which they had checked as husband and wife. He died of stab wounds inflicted on that occasion.

The Government's theory of the case was that Ms. Agurs was a prostitute, that she was in the process of going through Mr. Sewell's pants pockets while he was out of the room and, when he returned and found her, she used his knife, which she got from his clothing, to stab him.

The defense theory was that Ms. Agurs acted in self-defense and, although she did not testify, the case was defended on the theory that Mr. Sewell, who openly wore a Bowie knife, was in fact the one who initiated the use of the knife and, as a result, Ms. Agurs' actions came in the midst of a struggle, to save herself.

In view of that defense posture, the question of whether Mr. Sewell was the sort of man who would have initiated a knife fight, unprovoked, was highly relevant to the credibility of the self-defense theory. It was not likely that the jury would accept the self-defense theory unless they saw Mr. Sewell as aggressor, rather than victim.

There were discussions between Mr. Gaston, Ms. Agurs' defense counsel, and the prosecutor regarding evidence in the Government's possession, and the record reflects the fact that Mr. Gaston made a

request for whatever information the government had and was not refused. No discovery motions were filed, but the transcript of the calendar call of the case reflects the fact that there was apparent agreement as to discovery.[3/] The one item of evidence not turned over to defense counsel by the Government was the prosecutor's summary of Sewell's criminal record, which showed a 1963 conviction for assault and carrying a dangerous weapon (a knife) and a 1971 conviction for carrying a dangerous weapon.

Although he did not specifically request that the government turn over Sewell's criminal record, if any, Gaston later testified[4/] that he believed the prosecution would advise him if they knew that Sewell had a criminal record.

In preparing for trial, Gaston asked Ms. Agurs if she knew of any violence in Sewell's past and, when she said she did not, he decided not to investigate Sewell's background because, he believed, such evidence was not admissible unless the defendent was familiar with it. Gaston did no independent research other than to discuss the matter with an older lawyer, who agreed with him.

Some time after Ms. Agurs' conviction and sentencing, Gaston became aware of the Court of Appeals' opinion in United States v Burks, 470 F.2nd 432 (D.C. Cir. 1972) which referred to the admissibility of

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3/ See Appendix A.

4/ At the hearing on respondent's motion for a new trial.

evidence of past violent acts of the victim in a homicide case where self-defense is raised as "long-recognized." Gaston went to the United States Attorney's office looking for the assistant who had prosecuted the Agurs case to find out if Sewell has a criminal record. Another Assistant United States Attorney located the Agurs case file and, when he and Gaston went through it, they found the record of Sewell's convictions close to the front of the folder.

Gaston moved for a new trial on the ground that his misunderstanding of the law had prejudiced his client. After that motion was denied the Court of Appeals reversed. Judge Justice's opinion for the Court noted that the case cannot be characterized as one in which there was no request for the withheld information. The Court concluded, however, that the materiality of the evidence was a "much more significant factor" than either prosecutorial misconduct or defense neglect. On that point, it found the evidence of Sewell's proclivity to use and carry knives of sufficient significance on the issue of who was the aggressor to support the conclusion that Ms. Agurs had been denied a fair trial.

The Government's petition for rehearing and suggestion for rehearing en banc, was denied, with four active judges of the Court of Appeals, joined by Senior Judge Danaher, who concurred in the panel opinion dissenting.

REASONS FOR DENYING THE WRIT

Petitioner has characterized this case as being in conflict with decisions of other circuits and of this Court, because it rests upon a "disregard of the customary requirement of a meaningful defense request." (Petitioner's Brief at 9).

Because of this alleged disregard, "substantial confusion" exists, petitioner asserts, among government attorneys over their duty to disclose potentially exculpatory evidence. (Id. at 14)

In fact, as Judge Justice pointed out, this really can't be characterized as a case with no defense request. The record is really unclear as to the scope of the discussions which led to Mr. Gaston's statement on the record that there was "substantial agreement" on discovery. Although there was no specific request for Sewell's prior record, Gaston, who had had the discussions with the prosecutor, believed he would tell him if he knew Sewell had a criminal record.

The law is that, upon request, the government must turn over that information which may be exculpatory. Brady v Maryland, 373 U.S. 83; (1963) Moore v Illinois, 408 U.S. 786; (1972) Giglio v United States, 405 U.S. 150 (1971). The Court has never held that defense counsel must pinpoint the precise information sought to trigger the duty to disclose. This case did not create a need for guidance on what is sufficiently exculpatory to warrant disclosure. Nor does the case present the question of what standard should be employed when there is no request. Petitioner's argument that "[a] general request for all exculpatory information should be viewed as no better than no request at all," (Petitioner's Brief at 10 n.5), is without support

in the case law. Whether it is even consistant with the facts of the case is not clear from the record.

In Brady, the defense merely requested the "extrajudicial statements" of the co-defendant, and not the specific confession which later won reversal for the defendant. 373 U.S. at 84. In Moore, the request was for "all written statements". 408 U.S. at 791. The ground on which this Court decided Moore was that the withheld evidence was insufficiently material; but its reaching of that issue indicates that it found the general request adequate.

In Giglio, the Chief Justice, writing for a unanimous Court, held that the Government's failure to turn over impeachment material on the only witness testifying against the defendant violated due process. There the government's trial attorney had no knowledge of the evidence, and there is no record that defense counsel ever requested the information, although the defense did question the witness at trial concerning subjects covered by the withheld information. 405 U.S. at 152-53.

The Chief Justice reasoned that the Government had a duty to "insure communication of all relevant information on each case to every lawyer who works on it". Id., at 154. The above statement was made in the context of supplying information to all government lawyers on a case, but the object was to make it available to the defense and avoid inadvertant suppression.

Not only are decisions of this Court harmonious with the result here, but so are the holdings of the Courts of Appeals which the Government cites. We do not believe there is a conflict on either the request or the materiality issue. For example, in Shuler v.

Wainwright, 491 F.2nd 1213 (5th Cir. 1974), the court considered defense counsel's request for "all statements, documents, and similar materials in [the state's] possession exculpatory of either of the defendants," to be sufficient. Id. at 1222.

The Ninth Circuit, in United States v Baxter, 492 F.2nd 50 (9th Cir. 1973), held that even though the specific evidence which later proved to be exculpatory was never specifically requested, "[d]efendants' general pretrial requests for favorable evidence" met the Brady test. Id. at 174.

In United States v Rosner, 516 F.2nd 269 (2nd Cir. 1975), no request was at issue, and in United States v Schembari, 484 F.2nd 931 (4th Cir. 1973), the decision notes the absence of a request but does not indicate that point is controlling, dealing instead with the materiality question.

In United States v Keogh, 391 F.2nd 138 (2nd Cir. 1968), the court noted that the failure to make a specific request was not "irrelevant", but the case did not have the additional element, present here, of a discovery agreement which defense counsel thought covered the information at issue. Id. at 147.

Petitioner does not deal with the above decisions in any detail, only mentioning them briefly, and shifts its argument, when convenient, from asserting that there was no request to positing that on policy grounds that requests should be "narrowly and meaningfully drafted" so that the government can avoid administrative paperwork. (Petitioner's Brief at 9, 10,14).

The administrative burdens complained of, (Id. at 13-14), are entitled to no greater weight here than they were accorded in Giglio,

where the Chief Justice said that the adoption of sound management procedures, not violation of due process, was the solution to any attendant administrative burden stemming from compliance with Brady. 405 U.S. at 154.

The government could have eased the negligible administrative burden here--locating and examining the file[5/] -- by asking defense counselor, to frame a more specific request or by full disclosure. But if the government agrees to a discovery stipulation, and leaves the defense trusting that it will supply information, then no excuse of administrative pressure should be heard.

2. Petitioner contends that the Court of Appeals has here defined materiality in a way inconsistent with Brady and Moore (by implication). (Petitioner's Brief at 11-12). In fact, we believe the decision hews close to this Court's decisions. In Brady, this Court was concerned that evidence which "would tend to exculpate [the defendant] or reduce the penalty" had been withheld 383 U.S. at 88. In Moore, this Court "adhere[d] to the principles of Brady...but [held] that the present record embraces no violation of those principles". 408 U.S. at 798. On the unique facts of that case, the withheld evidence was not material because it did not impeach the credibility of either of the two eyewitnesses who testified that Moore committed murder, nor the testimony of the witness who said Moore admitted the crime to him. Id. at 797. The evidence, then, was cumulative and would not tend to

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5/ Moore is distinguishable in this regard because there the government turned over its file and the suppressed evidence was not readily accessible to the prosecutor, as it was here.

exculpate the defendant or reduce the penalty.

Two other key cases, cited but not analyzed, by petitioner are Giles v Maryland, 386 U.S. 66, (1967) and Giglio, supra, 405 U.S. 150. Their importance lies in the clarification they give to a definition of materiality. In Giles, this Court reversed a rape conviction where the defense was that the victim consented, and the suppressed evidence could have impeached her testimony. The withheld evidence in Giles was structurally very similar to that in this case; it was that the victim had been charged, in juvenile court, with promiscuous consent to sex acts. We read Giles as holding that evidence of proclivity of the victim is highly relevant when the defense is based on the victim's conduct-the same as in this case The Giles test was whether the evidence "might, therefore, have produced an acquittal or, at least, a reduction of penalty". 386 U.S. at 72.

Giglio involved the suppression by the government of an offer of immunity given to the state's only witness. The Chief Justice emphasized the importance of impeachment evidence when the case turned on the credibility of a single witness. 405 U.S. at 54-55. In our case, although Sewell was not there to testify, his "credibility" was very much in issue. Ms. Agurs could not expect to sustain her self defense claim without persuading the jury that he was the sort of person who would be the aggressor.

The circuits have verbalized different standards on materiality, as petitioner has noted. (Petitioner's Brief at 13). But despite the varying way in which courts have stated the materiality standard, the core issue in all cases is whether the jury might have reached a different verdict, if the withheld evidence had been before it. It was

to that issue the Court of Appeals spoke when it reversed defendant's conviction.

Not only does petitioner fail to show a discrepancy between the standard adopted here and the above cases, but the government also ignores the possibility that the jury, given the benefit of the suppressed evidence, will convict of a lesser included offense. Here the jury could have convicted defendant of manslaughter, as the Court of Appeals noted below.

3. The government's concern that United States Attorneys will be confused in evaluating their obligations under Brady if the Court of Appeals' holding is allowed to stand is misplaced. This case does not represent any departure from precedent of this Court. The government's obligation has always been to disclose exculpatory evidence; if a prosecutor decides to play judge and interpret what is necessary to disclose in a niggardly way, there is every reason to expect reversal. Furthermore, the expectation should be especially acute when, as here, the government attorney did not need to search other police records but rather had the information in his file.

The government asks for guidance in this area but has no right to expect an advisory opinion from this Court. A firm rule could not, in either case, be framed because cases involving Brady questions have consistently turned on their particular facts. The objective of full disclosure is best served by giving prosecutors an incentive to bend over backward to avoid problems on appeal.

4. To this point respondent has focused on demonstrating that petitioner's reasons for seeking review are without merit. However, even

if the government's positions were valid, its arguments would be substantially outweighed by the Court of Appeals' analysis of the case, the alternative grounds on which the decision below can be upheld, and and the technical defects which preclude the granting of a writ.

The Court of Appeals' decision was a carefully analized opinion which throughly examined the case law on the subject, analized the facts and considered the degree of materiality in the context of the defense offered, a vital task to perform in all cases of this type. Judge Justice recognized that the case involved unusual facts where the normal method of requesting information was altered by the trial judge's intervention leaving the defense believing it would receive certain information and rendering the record unclear as to the exact wording of the request.

The opinion below cannot be read as reducing the defense request to an irrelevancy. At most, it can be interpreted as saying that, on balance, the clear materiality here, coupled with a good faith effort to enter a discovery stipulation, requires disclosure. Read in this manner, the decision below is a narrow one, but correct and fair.

5. Should this Court decide against respondent on the disclosure question, defendant is entitled to have her alternative claim--that she was denied effective assistance of counsel in violation of her sixth amendment rights--decided. The Court of Appeals left the issue open, because it decided the case on the non-disclosure ground. 510 F.2nd at 1254.

The sixth amendment claim, which was raised by trial counsel in his motion for a new trial, is based upon both counsel's failure to

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investigate Sewell's background and upon his failure to do any legal research on the admissibility of evidence of the victim is proclivities toward violence. Under prevailing case law, those derelictions would amount to ineffective assistance of counsel. McQueen v Swenson, 498 F.2nd 207 (8th Cir. 1974); United States v DeCoster 487 F.2nd 1197 (D.C. Cir. 1973); King v Beto, 429 F.2nd 221 (5th Cir. 1970); Coles v Peyton, 389 F.2nd 224 (4th Cir. 1968).

The ineffectiveness of counsel claim may turn upon the question of whether a defense counsel who had properly researched, the law would have discovered the cases supporting the Court of Appeals' ruling in United States v Burks, 470 F.2nd 432 (D.C. Cir. 1972) (which ruled crimes of a victim admissible in circumstances such as existed here). As to this point, the record is "not sufficiently clear and specific to permit decision..." Massachusetts v Painten, 389 U.S. 560, 561 (1968). This technical defect should preclude review. Id. Moreover, the record is not clear on whether defense counsel was proceeding on the assumption that he had an agreement of "open file" discovery, which is consistent with his understanding that evidence like Sewell's criminal record would be disclosed.

6. As Judge Leventhal points out in his opinion concurring in the denial of the rehearing en banc, the decision below can also be justified on the alternative grounds of it being a proper exercise of the court's supervisory power granted by 28 U.S.C. §2106, which permits reversals "as may be just under the circumstances". 520 F.2nd at 84.

The Court of Appeals could properly have been justified even if the failure to disclose did not quite rise to the level of a Brady

violation; the combination of the suppression plus the ineffective assistance given by trial counsel would more than justify a reversal to prevent a miscarriage of justice.

7. Finally, to render a decision here this Court will have to scan an extensive (and ambiguous) record when its decision cannot be espected to have substantial effect on other than the parties to this litigation - a task which this Court has always been warned to avoid. Griffin v United States, 366 U.S. 704, 717 (1962); Wilkerson v McCarthy, 336 U.S. 53, 66 (1949) (Frankfurter J., concurring). In asking that a uniform standard be established to govern reversals in cases where material evidence has been withheld, petitioner is actually asking the Court to take on the job of reviewing the factual conclusions of the Court of Appeals without likely gain.

The evidence question involved--the admissibility of decedent's convictions--is so local in nature that petitioner would prefer not to see the issue raised, saying that this question is not "of sufficient importance to merit consideration".[6/] Respondent's position on that issue is that the rule of evidence is extremely important, but correctly decided and not the type of issue which usually attracts review in the Supreme Court.

Contrary to the government's, assertion this issue is relevant to deciding whether defendant was given effective assistance of counsel, as noted above, and is also a prerequisite to a decision on whether the government had a duty to disclose here. For if the evidence was admissible at the time of trial under the circuit's law, and the government should

6/ Petition for Writ of Certiorari, p.5, n.2

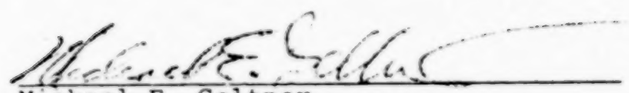
have known this, then the prosecutor's mistaken impression cannot excuse his conduct.

Respondent was denied the opportunity to offer to the jury the one piece of evidence most pertinent to her claim of self-defense. If offered, it would have been considered on the merits by the jury or, in the event the trial judge rejected it, respondent would have been in a position to appeal the error under Burks and put the evidence to the jury on the retrial. Whether the fault was that of the prosecutor or her appointed defense counsel is of secondary importance to respondent. What is important is that, on whatever ground, the Court of Appeals was correct in concluding that she was denied a fair chance to defend on the evidence.

CONCLUSION

For the foregoing reasons, the Government's petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that 2 copies of the attached Brief in opposition to petition for a writ of certiorari was served on counsel for petitioner by mailing, on October ____, 1975, postage paid, addressed to:

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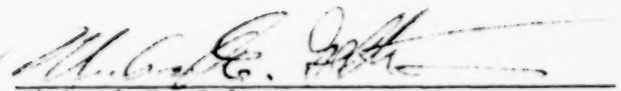

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In addition, we are here for a hearing on motions today. There are no motions to be filed. As I stated earlier, I had a rather lengthy discussion with Mr. Clarke and we have reached a substantial agreement as to discovery matters, and I was wondering if we might place that agreement on the record at this time.

THE COURT: If it is necessary. Have you had all of the discovery you want?

MR. GASTON: Well, not all, Your Honor, primarily because Mr. Clarke does not have it all in his possession at this time, such as photographs and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.

THE COURT: It has been this Court's experience we have never had a problem in that regard.

MR. GASTON: I have never had any, Your Honor.

THE COURT: If you have any, let me know.

MR. GASTON: Yes, Your Honor. Mr. Clarke has also agreed to hand me the grand jury minutes one week before trial. Is that not right, Mr. Clarke?

MR. CLARKE: Yes, Your Honor.

Your Honor, I might also point out that I have sent defense counsel a copy of the autopsy.

MR. GASTON: Then I will make this out.

THE COURT: If you will, I will pass the matter

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